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ABSTRACT

Intended to provide school officials an understanding of the legal aspects of common religious liberty and church-state questions in the public school context, this pamphlet attempts an objective summary of the current status of church-state law as it applies to the public schools. The document seeks to catalogue objectively the law as found in authoritative legal sources. Rather than citing all case law on a specific issue, where earlier decisions are subsumed or superseded by a controlling Supreme Court decision, the pamphlet cites only the Supreme Court precedent. Only when the document believes rulings are cast into doubt by subsequent developments or where the decisions themselves are unusually doubtful does it comment on the correctness of decisions/opinions cited. The document includes sections on the law regarding: prayer in school; teaching about religion; use of classroom space for religious activity; holiday observances; release time programs; physical facilities; dual enrollment; distribution of religious literature; baccalaureate services and graduation; scientific creationism; curriculum content; secular humanism; compulsory attendance and religious holidays; dress codes; vaccination requirements; and teachers' responsibilities and rights. The pamphlet concludes with a subject index for quick reference. Included is a separate December 1994 update citing and summarizing recent changes in the law on religion and the public schools. (LH)

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Religion and the Public Schools: A Summary of the Law

Marc D. Stern

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March, 1993

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RELIGION AND THE PUBLIC SCHOOLS: A SUMMARY OF THE LAW

INTRODUCTION

Probably none of the legal constraints applicable to the public schools are as controversial as those touching upon religion. Few are more likely to result in litigation. School officials thus have an understandable interest in knowing what the law is on common religious liberty and church-state questions in the public school context. Although not all the church-state problems confronting school officials have definitive answers, many have been resolved by the courts or state attorneys general. This pamphlet attempts an objective summary of the current state of church-state law as it applies to the public schools.

Thanks to computerized legal research, it is now possible to compile a comprehensive catalogue of these decisions. Nevertheless, this pamphlet does not discuss each and every decision bearing upon that subject. Where earlier case law is either subsumed in, or superseded by, a controlling Supreme Court decision, only the controlling Supreme Court precedent is cited. Thus, for example, although there were numerous cases decided in the lower federal courts concerning the teaching of scientific creationism, none are cited in this pamphlet because a later Supreme Court decision, *Edwards* v. *Aguillard*, encompasses those earlier rulings.

This pamphlet attempts to objectively catalogue the law as it is found in authoritative sources. Accordingly, only rarely does it comment on the American Jewish Congress' view of the correctness of decisions or opinions cited. The exceptions are those instances where rulings are either cast into doubt by subsequent developments or where a decision is unusually doubtful.

No attempt is made to provide a history of church-state or religious liberty issues in public education, such as aid to parochial schools. Those interested are referred to Leo Pfeffer's Church, State & Freedom (1967) and general histories of public education, such as Lawrence Cremins' three-volume study, American Education, or Diane Ravitch's The Great School Wars (1974).

I. PRAYER IN THE SCHOOLS

A. Vocal Prayer and Bible Reading

The Supreme Court has held that the practice of having a prayer recited daily in the classroom, even if non-denominational, is unconstitutional. *Engel* v. *Vitale*, 370 U.S. 421 (1962). That holding has been repeatedly reaffirmed, most recently in *Lee* v. *Weisman*, 505 U.S. _____(1992).

The prayer at issue in *Engel* was composed by the State. Although the opinion makes it appear as if that fact were determinative, subsequent cases held that all school-sponsored prayers and religious exercises are unconstitutional, including for example, opening exercises consisting of the reading of passages from the Bible. *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963). In both the *Engel* and *Schempp* cases, participation was 'voluntary', a fact which the Supreme Court found to be without constitutional significance in each case.

The rule against the officially-sponsored religious exercises is not overcome by requiring students to choose between attending the prayer session or going to another classroom. Nor is it permissible to permit student volunteers to select prayers for public recitation, either in the classroom or at school assemblies. *Karen B.* v. *Treen*, 653 F.2d 897 (5th Cir.), *aff'd*, 455 U.S. 913 (1981) (student volunteer to lead prayer); *Collins* v. *Chandler Unified School District*, 644 F.2d 759 (9th Cir. 1981) (student volunteer to lead prayer at school assemblies); *Opinion of the Justices*, 387 Mass. 1201, 440 N.E. 2d 1159 (1982) (volunteer to lead prayer or meditation); *Kent* v. *Commissioner of Education*, 380 Mass. 235, 402 N.E. 2d 1340 (1980) (volunteer to lead prayer); *Kansas O.A.G.* 82-52 (improper to permit before-school assemblies led by a minister).

Although the *Engel* and *Schempp* cases involved daily prayer in the classroom, the lower courts generally extended the ban on school prayers to all regular school functions, including assemblies and athletic events. Thus in one case the Court of Appeals held that a school district could not constitutionally delegate the task of offering prayers at high school football games to the local Ministerial Association. That court also found unconstitutional an "equal access" plan under which student volunteers could recite prayers of their own choosing as part of a pre-game ceremony. *Jager* v. *Douglas County School District*, 862 F.2d 824 (11th Cir. 1989); *Accord*, *Doe* v. *Aldine I.S.D.*, 563 F. Supp. 883 (S.D. Texas 1982). Neither can schools allow adult volunteers to tell Bible stories during lunch hour. *Doe* v. *Human*, 725 F. Supp. 1499 (W.D. Ark.), *aff'd without opinion*, _____ F.2d _____ (8th Cir. 1990).

Similarly, the common practice of high school coaches leading a team in prayer, or calling upon a team member to do so, before, during, or after an athletic event, is

unconstitutional. 10 *Tennessee O.A.G.* 365 (1980); *Wisconsin O.A.G.* 17-86 (1986) (college students).

Whatever doubt there was on the breadth of the constitutional rule against school sponsored prayer was removed by *Lee* v. *Weisman*, 505 U.S. _____(1992) (discussed in Part VIII, *infra*), which held that a school could not sponsor prayer at high school graduations, even though these were not daily events, were offered by non-school personnel, teachers were not present as role models, and parents were present to protect their children. It was sufficient for the Court that the ceremony was conducted by the school, that it occupied an important place in the operation of the school and that school officials controlled the program. However, subsequent to *Lee* v. *Weisman*, the United States Court of Appeals for the Fifth Circuit held that a school board could constitutionally permit the students to select a prayer for graduation. *Jones* v. *Clear Creek I.S.D.*, 977 F.2d 963 (5th Cir. 1992). An appeal of this doubtful decision is anticipated.

Individual students may engage in private, quiet, religious activities, so long as the conduct is not disruptive and does not interfere with the right of others to be left alone. Contrary to what is sometimes said by advocates of prayer in the public schools, the Supreme Court has not prohibited students from reading the Bible, praying, reciting the rosary, or informally discussing religious subjects with classmates. *Kansas O.A.G.* 88-12. On the contrary, any official interference with such activities would itself be unconstitutional, unless demonstrably necessary to maintain order in the school or protect the rights of other students. *Maryland Attorney General Opinion No. 84-031*, 69 O.A.G. Maryland _____(1984). See Part VIII, B, *infra*, for a further discussion of the problem of student religious activity in the schools.

While they are present in the public school, teachers may not pray with, or in the presence of, their students. The Constitution permits the termination of a teacher who abuses his or her position in this way. *Webster* v. *New Lenox School District*, 917 F.2d 1009 (7th Cir. 1990); *Roberts* v. *Madigan*, 921 F.2d 1047 (10th Cir. 1991); *Breen* v. *Reinkel*, 614 F. Supp. 355 (W.D. Mich. 1985); *Rhodes* v. *Laurel Highlands School District*, 118 Pa. Cmwlth. 119, 544 A.2d 562 (1988); *Fink* v. *Board of Education*, 65 Pa. Cmwlth. 320, 442 A.2d 837 (1982), *app. dismissed for want of a substantial federal question*, 460 U.S. 1048 (1983); *LaRocca* v. *Board of Education*, 63 A.D.2d 1019, 406 N.Y.S. 2d 348 (2d Dept.), *app. dismissed*, 46 N.Y. 2d 770 (1978); *Alaska O.A.G.* File No. 663-88-0573 (September 15, 1988); *Lynch* v. *Indiana State University*, 177 Ind. App. 176, 378 N.E. 2d 900 (1978) (college professor may not pray with students); *Bishop* v. *Aronov*, 926 F.2d 1066 (11th Cir. 1991) (teacher may not express even occasional religious views in college class). Similarly, a teacher may not

insist on teaching creationism, or resist teaching evolution, on the theory that evolution is a religious viewpoint. *Peloza* v. *Capistrano Unified School District*, 725 F. Supp. 1412 (C.D. Cal. 1992). A school board which knowingly acquiesces in a public school teacher's practice of praying in the presence of students may be held liable for the actions of the teacher. *Steele* v. *Van Buren Public School District*, 845 F.2d 1492 (8th Cir. 1988).

B. Silent Prayer/ Silent Meditation

The extent to which school authorities may set aside a moment for silent prayer or meditation remains unclear. In *Wallace* v. *Jaffree*, 472 U.S. 38 (1985), the Supreme Court invalidated an Alabama statute requiring a moment of silence at the beginning of each school day which students could use for "prayer and meditation." The majority emphasized that the Alabama legislature enacted the statute with the specific purpose of furthering religion. Because the case produced several opinions, it is difficult to predict whether all moment-of-silence statutes mentioning prayer are unconstitutional. Moment-of-silence statutes not mentioning prayer will likely be found constitutional.

Decisions subsequent to *Wallace* send mixed signals. On the ground that it was enacted with a religious purpose, a divided federal appeals court invalidated a New Jersey moment-of-silence statute not mentioning prayer, *May* v. *Cooperman*, 780 F.2d 240 (3rd Cir. 1985), *dismissed on procedural grounds sub nom Karcher* v. *May*, 484 U.S. 72 (1987). On the other hand, the Virginia Attorney General has opined that Virginia's moment-of-silence statute, mentioning prayer, is constitutional. 1985-1986 Report of the Virginia Attorney General 152. The Kansas and Nevada Attorneys General have likewise concluded in the wake of the *Wallace* decision that their state's respective statutes, both mentioning prayer, are constitutional. *Kansas O.A.G.* 85-83 (1985); *Nevada O.A.G.* 85-15 (1985).

However, even if a statute is not unconstitutional it can be implemented in an unconstitutional way, *e.g.*, if students are told to bow their heads or stand for the moment-of-silence, or if a particular teacher urges that the time be used for prayer. *Walter* v. *West Virginia Board of Education*, 610 F. Supp. 1169 (S.D. W.Va. 1985); Wisconsin O.A. G. 17-86 (1986).

For a discussion of graduation prayers *see* Point VII, *infra*.

II. TEACHING ABOUT RELIGION

The constitution permits objective teaching about religion. One cannot teach the history of civilization without teaching about religion. Neither can art or music be taught without reference to religion. *Engel* v. *Vitale*, 370 U.S. 421 (1962); *School*

District of Abington Township v. *Schempp*, 374 U.S. 203 (1963); *see Edwards* v. *Aguillard*, 482 U.S. 578, 607-08 (1987) (Powell, J., concurring); *Grove* v. *Mead School District*, 753 F.2d 1528 (9th Cir. 1985); *Florey* v. *Sioux Falls School District*, 619 F.2d 1321 (8th Cir. 1980); *Todd* v. *Rochester Community Schools*, 41 Mich. App. 320, 200 N.W. 2d 90 (1972).

Several recent studies concluded that texts and curricula tend to slight religion. A failure to "adequately" discuss the role religion plays (or played) in a particular field of study does not teach the religion of secular 'humanism', unless the exclusion is intended to denigrate the importance of religion. *Smith* v. *Board of Commissioners*, 827 F.2d 684 (11th Cir. 1987).

Objective teaching about religion has given rise to numerous difficulties, among the most intractable of which are those arising from the teaching of "Bible as Literature" classes. It has been suggested that only regularly certified public school teachers, not uncertified ministers, can teach such courses, _____ *West Virginia O.A.G.* _____ (October 31, 1985). That same opinion suggests that, at the secondary school level, modern critical Biblical scholarship should be included in the curriculum.

To pass constitutional muster, any course on the Bible must be devoid of denominational bias. *Hall* v. *Board of School Commissioners*, 656 F.2d 999 (5th Cir. 1981) ("Bible as Literature" taught from sectarian text unconstitutional); *Wiley* v. *Franklin*, 468 F. Supp. 133, *on further consideration*, 474 F. Supp. 525 (E.D. Tenn. 1979), *on further consideration*, 497 F. Supp. 390 (E.D. Tenn. 1980).

The *Wiley* court held that certain sections of the Bible could not constitutionally be taught because they were wholly sectarian. Teaching about those sections was held to serve no secular purpose. This is simply incorrect. As a matter of law, one can theoretically teach about any part of the Bible. However, it does not follow that school officials cannot exercise professional judgment about what parts of the Bible should be taught in order to avoid pedagogical difficulties.

That the Bible is not taught from a religious point of view in Bible-as-Literature courses is not unconstitutional hostility to religion. *Cf. Calvary Bible Presbyterian Church* v. *Board of Regents*, 436 P.2d 189 (Wash. 1968) (college level course).

In *Crockett* v. *Sorenson*, 568 F.Supp. 1422 (W.D. Va. 1983), the court noted that, while a Bible-as-Literature course was sufficiently secular to be taught in a public school, it was sufficiently religious to require excusal of students who did not wish to participate. The Court disagreed with the contrary decision on the point in *Vaughn* v. *Reed*, 313 F. Supp. 431 (W.D. Va. 1970). On excusal of students from school activities on religious grounds, *see* Point XI(B), *infra*.

Public school libraries may include significant religious literature, such as the Bible, provided that no one sect's literature is favored, and the library as a whole does not show any preference for religious works. *Roberts* v. *Madigan*, 702 F. Supp. 1505 (D. Col. 1989), *aff'd*, 921 F.2d 1047 (10th Cir. 1989); *Evans* v. *Selma Union High School District*, 193 Cal. 54, 232 P. 801 (1923).

The Ten Commandments may not be displayed on classroom walls. *Stone* v. *Graham*, 449 U.S. 39 (1980). Neither may a student painting depicting the crucifixion be left on permanent display in the school auditorium. *Joki* v. *Board of Education*, 745 F. Supp. 823 (N.D. N.Y. 1990). However, prior to *Stone* v. *Graham*, a plaque bearing the motto "In God We Trust" was held to be a permissible classroom display. *Opinion of the Justices*, 108 N.H. 97, 228 A.2d 161 (1967).

Transcendental Meditation is a religious doctrine and may not be taught in the public schools. *Malnak* v. *Yogi*, 592 F.2d 197 (3d Cir. 1979).

III. USE OF CLASSROOM SPACE FOR STUDENT INITIATED RELIGIOUS ACTIVITIES

A. Constitutional Claims for for Student Religious Clubs

Student religious groups have requested permission to meet in vacant public school classrooms during school club periods held either before or after school, or less frequently, during free periods during the school day. Their claims have rested on both a constitutional and statutory basis under the Equal Access Act (the "Act"), discussed below at Part III.B. The constitutional claims are now of secondary importance given the Supreme Court's construction of the Act.

In *Widmar* v. *Vincent*, 454 U.S. (1981), the Supreme Court held that a public university which allowed secular extracurricular student groups use of empty classrooms could not deny access to student religious groups. Since the university was a limited public forum – a place deliberately set aside for members of the student body to express and exchange views – the university's rule distinguishing between secular and religious groups constituted illicit discrimination against speech based on content, and was therefore impermissible unless justified by a compelling interest of the university. The university argued that as a public institution it had a compelling interest in not aiding or endorsing religion. The Court, however, found that the bare granting of access to religious clubs did not implicate those concerns. It therefore invalidated the university's rule against use of its premises by religious clubs.

The lower federal courts divided on the question of whether the *Widmar* analysis should be applied to elementary and secondary schools. *Bender* v. *Williamsport Area*

School District, 475 U.S. 534 (1984), was expected to resolve this division of authority. The Supreme Court, however, decided the case on procedural grounds. Nevertheless, four Justices did express the view that student religious clubs were constitutionally entitled to the same access to school facilities as were their university counterparts. However, the unanswered constitutional question is now of practical import only in those cases in which the statute, the Equal Access Act, does not apply, as in the case of non-secondary schools or during instructional time – and those cases are far less likely to involve limited public forums as did the college program at issue in *Widmar*, and hence present a far easier case for excluding religious speech.

Even though students may now join religious clubs, and meet under the terms of the Equal Access Act, public schools may not themselves formally sponsor or promote religious clubs. *Bell* v. *Little Axe Independent School District*, 766 F.2d 1391 (10th Cir. 1988). *Cf. Quappe* v. *Endry*, 772 F. Supp. 1004 (S.D. Ohio 1991), *aff'd*, _____ F.2d _____ (6th Cir. 1992) (table); *Sease* v. *School District*, 1993 W.L. 12388 (E.D. Pa. 1993).

B. The Equal Access Act

The Equal Access Act, 20 U.S.C. § 4071, *et seq.* ("EAA"), provides the basis for the statutory claims for extra-curricular religious clubs. It is a complex piece of legislation. In brief, it provides that a secondary school (as defined by state law) which chooses to allow non-curriculum related student-initiated groups to meet before or after, but apparently not during, the school day (*see South Carolina O.A.G.* _____ (April 15, 1987)) may not discriminate against any other student-initiated club based on its philosophic, religious or political content. The Act confers a right for all student clubs to meet only if school officials permit non-curriculum clubs to meet. Curriculum-related clubs (*e.g.*, the Spanish Club) do not trigger the provisions of the Act.

The Supreme Court considered the construction and constitutionality of the Act in *Westside Community School Board* v. *Mergens*, 496 U.S. 226 (1990). The Court's opinion has two parts, one statutory, the other constitutional. In turn, the statutory section had two parts. The first interpreted the phrase "non-curriculum club"; the second discussed statutory restrictions on such clubs. The Court found the Act constitutional both on its face and as applied in the Westside Community schools.

Whether the Act applies to a particular school depends on whether it permits "non-curricular" clubs to meet. Congress did not define that term. The Court defined that phrase as follows:

> We think that the term "non-curriculum related student group" is best interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school. In our view, a student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; or if

participation in the group results in academic credit. We think this limited definition of groups that directly relate to the curriculum is a common sense interpretation of the Act that is consistent with Congress' intent to provide a low threshold for triggering the Act's requirement.

For example, a French club would directly relate to the curriculum if a school taught French in a regularly-offered course or planned to teach the subject in the near future. A school's student government would generally relate directly to the curriculum to the extent that it addresses concerns, solicits opinions, and formulates proposals pertaining to the body of courses offered by the school. If participation in a school's band or orchestra were required for the band or orchestra classes, or resulted in academic credit, then those groups would also directly relate to the curriculum. The existence of such groups at a school would not trigger the Act's obligations.

On the other hand, unless a school could show that groups such as a chess club, a stamp collecting club, or a community service club fell within our description of groups that directly relate to the curriculum, such groups would be "non-curriculum related" student groups for purposes of the Act.

The Court also interpreted § 4071(C) of the Act which contain certain restrictions on school involvement with the clubs. It held that these provisions were mandatory and not, as some had urged, a permissive "safe-harbor" provision". Section 4071(c) provides:

Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that:

(1) the meeting is voluntary and student initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents only in a non-participatory capacity;

(3) employees or agents of the school or government are present at religious meetings only in a non-participatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) non-school persons may not direct, conduct, control, or regularly attend activities of student groups.

Although, on its face, this provision does not require schools to take these steps, a majority of the Court read it as if it said schools must insure that meetings are voluntary and the like. *See Quappe* v. *Endry*, 772 F. Supp. 1004 (S.D. Ohio 1991), *aff'd*, _____ F.2d _____ (6th Cir. 1992) (teacher may not urge attendance at after school religious class).

Where school officials regularly participate in the activities of a club, it may not invoke the Equal Access Act. *Sease* v. *School District*, 1993 W.L. 12388 (E.D. Pa. 1993).

Schools are free under the Act to insist the each meeting be attended by a school employee, who may only maintain order, but not otherwise. They may also interfere with the functioning of student clubs to preserve discipline, protect the rights of other students or prevent illegal acts.

What happens if state law makes it illegal for schools to permit religious meetings on public school premises? One way of avoiding the problem would be to ban all student non-curriculum groups, but schools are understandably reluctant to do this. Two federal district courts have reached opposite conclusions about the applicability of state constitutional restrictions on religious meetings in the public schools as a justification for not complying with the federal Equal Access Act. In *Garnett* v. *Renton Area School District*, 772 F. Supp. 531 (D. Wash. 1991), the trial court held that because the Act did not authorize "otherwise illegal" meetings, it did not require schools to allow meetings illegal under the state constitution. The trial court in *Hoppock* v. *Twin Falls School District*, 772 F. Supp. 1160 (D. Idaho 1991) reached an opposite conclusion. An appeal is pending in the *Garnett* case.

The Supreme Court in *Mergens* also held that the Act's prohibition on discrimination was quite broad, and that it was violated by denying a religion club equal access with secular clubs to bulletin boards, PA systems, a school-sponsored club fair or formal school recognition. However, notwithstanding the prohibition on discrimination, it is apparently legal for a school district to disclaim sponsorship only of student religious groups, although it would be the better part of wisdom to disclaim sponsorship of all student non-curricular groups.

In *Thompson* v. *Waynesboro Area School District*, 673 F. Supp. 1379 (M.D. Pa. 1987), *aff'd by an equally divided court*, ____ F.2d ____ (3rd Cir. 1989), the Court held that, since the distribution of literature was not a "meeting" it was not protected by the Act, although the Court held that the Constitution did offer protection to such activity. *See* Point VIII, below.

For a good discussion of the Act's application in the context of a non-religious group, *see Student Coalition* v. *Lower Merion School District*, 776 F.2d 431 (3d Cir. 1985), *on remand*, 633 F. Supp. 1040 (E.D. Pa. 1986).

C. Teacher Claims to Hold
Religious Meetings on School Premises

Unless a school permits teachers to use empty classrooms for meetings on whatever topic they choose, teachers have no right to hold religious meetings in an

empty public school classroom, before or after school, even where only other teachers will be in attendance. *May* v. *Evansville-Vanderburgh School Corp.*, 787 F.2d 1105 (7th Cir. 1986). However, teachers may informally discuss religious topics among themselves, provided those discussions do not interfere with their duties and do not take place in the presence of students. *Cf. Texas State Teacher's Association* v. *Garland Independent School District*, 777 F.2d 1046 (5th Cir. 1985), *aff'd*, 479 U.S. 801 (1986).

D. Rental of School Facilities For After Hours Use

1. What Schools May Do

The question of equal access to student clubs must be distinguished from the question of whether school officials may make school facilities available for after-hours use by religious groups, even if no religious symbols are displayed when the public schools are in session.

If broadly available to community groups, school facilities may constitutionally be made available to religious groups on a less-than-permanent basis upon payment of a fee approximating either the cost of the facilities (heat, light, maintenance) or, perhaps, the fair rental value, without establishing religion. *Resnick* v. *Board of Education*, 77 N.J. 88, 389 A.2d 944 (1978); *O'Hara* v. *School Board*, 432 So. 2d 1356 (Fla. App. 1983); *Southside Estates Baptist Church* v. *Board of Trustees*, 115 So. 2d 697 (Fla. App. 1959); *90 Virginia O.A.G.* (October 10, 1990) (same, but school may charge churches higher rental fees); *South Carolina O.A.G.* (February 21, 1990); *Mississippi O.A.G.* (May 9, 1984).

Surplus school property may be leased to sectarian institutions for fair market value, provided that it "is sufficiently remote from other property being retained for school purposes to avoid the appearance of an endorsement of the religious activities." *Maine O.A.G.* 80-43 (1980). However, the courts are divided over whether a school district may refuse to sell surplus school property to parochial schools, at least where the existence of parochial schools makes maintaining racial integration in the public schools more difficult. *Compare Wilmington Christian School Inc.* v. *Board of Education, Red Clay Consolidated School District*, 545 F. Supp. 440 (D. Del. 1982) (schools may refuse to enter such leases) with *Binet-Montessori, Inc.* v. *San Francisco Unified School District*, 98 Cal. App. 3d 991, 160 Cal. Rptr. 38 (1979) (schools may not deny leases on this basis).

2. What Schools Must Do

Whether schools must, as a matter of constitutional law, rent their facilities to church groups for after-hour uses if they rent to groups is unclear. Most courts have held that schools may not constitutionally refuse to allow after-hours uses by religious

groups if they rent to all other community groups, even if state law does not explicitly authorize to rentals to religious groups. *Grace Bible Fellowship* v. *Main S.D.A High School*, 941 F.2d 45 (1st Cir. 1991); *Verbena Methodist Church* v. *Chelton Bd. of Educ.*, 765 F. Supp. 704 (N.D. Ala. 1991); *Youth Opportunities* v. *Bd. of Public Educ.*, 767 F. Supp. 1346 (W.D. Pa. 1991); *County Hills Christian Church* v. *Unified School District #512*, 560 F. Supp. 1207 (D. Kan. 1983); South Carolina A.G. (February 21, 1990); *Kansas O.A.G.* 82-51 (1982).

The Second Circuit, by contrast, holds that a school may, where state law bans religious groups from renting school facilities, enforce that restriction so long as it does not pick and choose among religious groups or types of religious speech. *Lamb's Chapel* v. *Center Moriches School District*, 959 F.2d 381 (2d Cir.), *cert. granted*, (1992); *Travis* v. *Osego Apalchin District*, 927 F.2d 688 (2d Cir. 1991); *Deeper Life Christian Fellowship* v. *Board of Education*, 852 F.2d 676 (2d Cir. 1988).

The Third Circuit, in *Gregoire* v. *Centennial School District*, 907 F.2d 1366 (3rd Cir. 1990), is somewhere in between these two approaches, although it is somewhat closer to the rule of the majority of courts, which do not allow the blanket exclusion of religious speech from a limited public forum. In *Gregoire*, the Third Circuit ordered school officials to allow a weekend rental of a school auditorium to a religious group where the school rented the facility to a wide variety of groups. The United States Supreme Court decision to review *Lamb's Chapel* should clarify the law in this area.

It has been held that school facilities may not be rented for religious uses by released time religious classes immediately before or after school, *Quappe* v. *Endry*, 772 F. Supp. 1004 (S.D. Ohio 1991), *aff'd*, ____ F.2d ____ (6th Cir. 1992) (but court noted presence of special circumstances in past involvement of teacher in activity); *Ford* v. *Manuel*, 629 F. Supp. 771 (N.D. Ohio 1985) or during the school day, *Arizona O.A.G.* 86-078. *Accord*, 1966 Alaska O.A.G. #3, 1977 California O.A.G. 269 (interpreting state constitution). Annotation, Schools – Use for Religious Purposes, 79 A.L.R. 2d 1148 (1961).

One court has held that schools may refuse to rent school space for dances because such group's activities are offensive to the religious sentiments of the community. *Clayton* v. *Place*, 884 F.2d 376 (8th Cir. 1989), *rehearing and rehearing en banc denied*, 889 F.2d 192 (8th Cir. 1989). The school had previously rented the school building to other groups. To protect its refusal to rent to groups running dances, it suspended its rule permitting rentals of school buildings to any non-school group. 889 F.2d at 194, n.4 (Gibson, J., dissenting).

School officials may insist that requests for rentals of public school buildings by religious groups – but not others – be considered by the Board of Education itself "in order to ensure the proper handling of Establishment Clause issues." *Salinas* v. *School District*, 751 F.2d 285 (8th Cir. 1984).

IV. HOLIDAY OBSERVANCES

The leading decision on public school celebrations of religious holidays such as Chanukah, Christmas, and Easter is *Florey* v. *Sioux Falls School District*, 619 F.2d 1311 (8th Cir. 1980). In *Florey*, a divided court upheld school board rules which permitted the observance of holidays with both a secular and religious basis, provided that the observances were conducted in a "prudent and objective manner." 619 F.2d at 1319 (1980). *Accord*, *Johnson* v. *Shiverman*, 658 S.W. 2d 910 (Mo. Ct. App. 1983); *Arkansas O.A.G.* 88-115 (1988); *Appeal of Rosenbaum*, 73 (N.Y.) State Dept. Rep. 116 (1988) (all following *Florey*).

The *Florey* rules permitted the display of religious symbols as teaching aids, and provided that religious works of drama and music could be performed as well as studied. Students who objected to participating in Christmas observances were to be excused. In a similar vein, in *Lynch* v. *Donnelly*, 465 U.S. 688, 686 (1984), the Supreme Court stated that the singing of carols at Christmas time is a common occurrence in the public schools.

The *Florey* court noted that its decision meant only that the rules adopted by the Sioux Falls School District were not inevitably unconstitutional. It was careful to point out that particular events conducted under authority of the rules might nevertheless be unconstitutional. Thus, in *Mainger* v. *Mukilteo School District*, No. 85-2-04671-2 (Sup. Ct., Snohomish County, Wa. 1986), a Washington trial court barred a teacher from displaying a creche and a menorah in his classroom. The court found that the particular display was intended to convey a religious message.

Subsequent to *Florey*, many school districts adopted the rules upheld in that decision. Others have adopted rules which more closely regulate what types of holiday programs are permissible, justifying their imposition of those more restrictive standards on the ground that the *Florey* rules were insufficiently sensitive to school children of minority faiths.

The constitutional problems with public school holiday observances[1] are not cured by observing the holidays of all faiths, although they are exacerbated when the schools observe only the holidays of one faith. For more specific guidance, *see*, Religious Holidays in the Public Schools: Questions and Answers (1989), published by a coalition of religious and educational groups. Copies are available from AJCongress.

V. RELEASED TIME PROGRAMS

While released time programs have declined significantly in importance since a mid-century peak, they appear to be enjoying something of a resurgence. Under such programs, students are "released from" the public school building to attend off-premises religious classes. Students who choose not to participate in released time religious instruction may not be penalized for declining to participate, but are typically allowed to remain behind in the classroom. Although school officials may permit a released time program they are under no constitutional obligation to do so. *California O.A.G.* 80-1005 (1980). Of course, state law may require local school officials to cooperate with religious leaders who wish to conduct a released time program.

Released time programs are constitutional only if they take place away from public school grounds; school officials do not promote attendance at religion classes; and solicitation of students to attend is not done at the expense of public schools. *Zorach* v. *Clauson*, 343 U.S. 306 (1952); *McCollum* v. *Board of Education*, 333 U.S. 203 (1948); *California O.A.G.* 80-1005 (1981); *Doe* v. *Human*, 725 F. Supp. 1499 (W.D. Ark. 1989), *aff'd without opinion*, 923 F.2d 857 (8th Cir. 1990) (Bible story hour during lunch time impermissible). *Smith* v. *Smith*, 523 F.2d 121 (4th Cir. 1975); *Arkansas O.A.G.* 84-198 (1984).

Schools may not distribute permission slips for released time programs. Those sponsoring such programs must carry this burden by themselves. *Perry* v. *School District*, 54 Wash.2d 886, 344 P.2d 1036 (1959); *Oregon O.A.G.* 82-40 (1989); *see*, *California O.A.G.* 80-1005 (1981) (permitting notice to appear in PTA newsletter, but otherwise prohibiting school from distributing notices about a released time program); *Doe* v. *Shenandoah County School Board*, 737 F. Supp. 913 (W.D. 1990). Released time classes may not be held in rented public school classrooms immediately before or after

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1. The objection to holidays is not teaching about religious holidays, for such teaching is permissible. The objection is to observing them at the time when, and in the same manner as these holidays are celebrated in churches and synagogues.

the school day. *Quappe* v. *Endry*, 772 F. Supp. 1004 (S.D. Ohio 1991), *aff'd* _____ F.2d _____ (6th Cir. 1992); *Ford* v. *Manuel*, 629 F. Supp. 771 (N.D. Ohio 1985).

Public schools may not rent space to religious groups for religious instruction to take place during the public school day. *Arizona O.A.G.* 86-078 (1986); 1966 *Iowa O.A.G.* 292 (1965), nor may released time classes be held in school buses on school parking on school grounds, *Doe* v. *Shenandoah County School Board*, 737 F. Supp. 913 (W.D. Va. 1990). A related question is whether the public schools may give academic credit for released time classes. The judicial answer so far is a highly tentative no, at least if credit is not given for other non-school courses. *Lanner* v. *Wimmer*, 463 F. Supp. 867 (D. Utah 1978), *aff'd in relevant part*, 662 F.2d 1349 (10th Cir. 1981); *State ex rel Dearle* v. *Frazier*, 102 Wash. 369 173 P.35 (1918) (state constitution). *See Ohio O.A.G.* 88-001 (1988) (noting question, but declining to answer it).

VI. PHYSICAL FACILITIES

Public schools may not enter into shared facilities arrangements, under which parochial school students take part of their secular training (or receive remedial instruction) at the parochial school which they attend, even if the classes are taught by public school teachers. *Grand Rapids School District* v. *Ball*, 473 U.S. 373 (1985); *Aguilar* v. *Felton*, 473 U.S. 402 (1985) (federal Chapter I remedial programs). Nor may schools "creat[e] and financ[e] an artificial public school within a church school." *Americans United* v. *Paire*, 359 F. Supp. 505 (D. N.H. 1973); *Americans United* v. *Board of Education*, 369 F. Supp. 1059 (E.D. Ky. 1974).

Remedial instruction may be provided off-parochial-school-premises, at sites under the control of public school officials, or in the public schools.[2] *Aguilar* v. *Felton*, *supra*. When in-public-school classes are arranged for parochial students, school officials may not segregate parochial school students from public school students to accommodate the religious beliefs of the parochial school students. *Parents' Association* v. *Quinones*, 803 F.2d 1235 (2d Cir. 1986). *See also*, *Board of Education* v. *Weider*, 72 N.Y. 2d 174, 531 N.Y. 2d 889, 527 N.E. 2d 767 (1988) (state law permits, but does not mandate, provision of services at neutral site, other than a public school). *Accord*, *Wisconsin O.A.G.* 45-86. Nor may the state establish a separate public school district for the sole purpose of providing remedial education to parochial school students who do not wish to be served with public school students. *Grumet* v. *New York Department*

2. In some states there are state-law prohibitions on "dual enrollment" which may preclude integrating parochial school students into the public school classrooms.

of Education, 151 Misc.2d 60, 579 N.Y.S.2d 1004 (Sup. Ct. Albany Cty.), *aff'd*, _____ App.Div.2d _____, _____N.Y.S.2d _____ (3rd Dept. 1992).

On the other hand, the question of whether religiously identifiable neutral sites (*e.g.*, mobile vans or rental facilities) are permissible at non-school facilities is unresolved. The Supreme Court has indicated that there is no constitutional objection to providing secular services (under the control of public school officials) to parochial school students in facilities in which students of only one faith are served. *Wolman* v. *Walter*, 433 U.S. 229, 247-48 (1977). The common practice of conducting Chapter I programs for parochial school students in vans is therefore constitutional. *Cf. Pulido* v. *Cavazos*, 934 F.2d 912 (8th Cir. 1992); *Walker* v. *San Francisco U.S.D.*, 761 F. Supp. 1463 (N.D.Cal. 1991), *app.pending* (9th Cir. 1992); *Barnes* v. *Cavazos*, 966 F.2d 1056 (6th Cir. 1991). The *Pulido* court held that vans may be parked on parochial school property, but *Walker* holds the vans must be off parochial school property. An opinion of the Nebraska Attorney General (*NE O.A.G.* 92-021) permits the public school authorities to 'lease' space in the parochial schools to provide remedial services, but this appears to be inconsistent with *Aguilar*.

The additional costs of providing off-premise sites, such as the purchase or lease of mobile vans, may be charged "off the top" against a state's entire federal grant, not only to that portion of a state's grant earmarked for parochial school students. *Bd. of Educ.* v. *Alexander*, 1992 W.L. 372, 595 (7th Cir. 1992); *Pulido* v. *Cavazos*, *supra*; *Barnes* v. *Cavazos*, *supra* and *Walker* v. *San Francisco U.S.D.*, *supra* hold the off-the-top allocation of these expenses constitutional. *See also*, *Connecticut O.A.G.* 85-62 (1985), *Wisconsin O.A.G.* 45-86 (1986); *Wisconsin O.A.G.* 86-78 (1978).

Where exigent circumstances, such as in increase in enrollment, leave the public schools short of space, they may rent facilities from churches, if there are no religious symbols in the rented space; the rented rooms are wholly distinct from space used for religious purposes and are not subject to the control of the parochial school. *Thomas* v. *Schmidt*, 397 U.S. 203 (D. R.I. 1975); *Americans United* v. *Oakey*, 339 F. Supp. 545 (D. Vt. 1972); *School District* v. *Nebraska State Board of Education*, 88 Neb. 1, 195 N.W. 2d 161, *cert. denied*, 409 U.S. 921 (1972) (Marshall, J., *dissenting from*, and Brennan, J., *concurring in*, *denial of certiorari*).

When a public school leases space from a church, but the lease prohibits the public schools from teaching any matter which conflicts with church doctrine, and where not all religious symbols were removed or covered, the Establishment Clause is violated. *Spacco* v. *Bridgewater School Department*, 722 F. Supp. 834 (D. Mass. 1989). The *Spacco* court took a more severe view of the presence of religious symbols

elsewhere in the leased church building than in the leased classroom than many earlier courts had. *Spacco* was ultimately settled. *Spacco* v. *Bridgewater School Department*, 1990 W.L. 79001 (D. Mass. 1990).

Similarly, a public school may not lease its gymnasium to a parochial school for use during the school day, even if the parochial school's use would not interfere with the public school's activities. *South Carolina O.A.G.* (April 23, 1970) (state law); *Wisconsin O.A.G.* 45-86 (1986). And even where state law allows surplus space in a functioning public school to be leased to non-profit organizations during the school day, religious groups may be denied an equivalent opportunity to rent that space. 60 *California O.A.G.* 269 (1977). *See* above at Part V, *supra*. In sum, the rule appears to be that, while religious groups may use public school facilities when they are not used as public schools, *see* Part III, *supra*, they may not do so when the public schools are functioning as such. Whether this restrictive rule is tenable in light of cases such as *Widmar* v. *Vincent* (discussed in Part IIIA) remains to be seen.

One court has held that a public university may not place student teachers in parochial schools. *Stark* v. *St. Cloud State University*, 802 F.2d 1046 (8th Cir. 1986). However, with the exception of a stipend paid to supervising parochial school teachers, the Kansas Attorney General upheld a similar program. *Kansas O.A.G.* 85-146 (1985).

A public school vocational program may contract with a church to build a church building, where the program is designed to give students practical work experience, the fees paid by the church reflect the cost of providing the service, and the church competes against other bidders for the use of students' services. *Connecticut O.A.G.* 88-021 (1988). The opinion noted that it might be necessary to find an alternate placement for students who objected to working on a church building.

VII. DUAL ENROLLMENT

The State courts are divided over whether schools may (or must) allow non-public school students, including those who attend parochial schools, to attend public school classes or extra-curricular programs. In some states, "dual attendance" is prohibited by statute.

The Michigan Supreme Court held that parochial students must be admitted to "non-core curricular" classes under state law and the Free Exercise Clause of Constitution. It also held that such attendance does not violate the Establishment Clause. *Snyder* v. *Charlotte Public School District*, 421 Mich. 517, 365 N.W.2d 151 (1985). By contrast, a Maryland court concluded that school officials are not compelled by the Constitution or Maryland statutes to permit such attendance. *Thomas* v. *Allegheny Board of Education*, 51 Md. App. 312, 443 A.2d 622 (1982). *Accord Missouri*

O.A.G. 127-92 (1992) (home schooled student must not be allowed to attend some public school classes). In *Mans* v. *Nelson*, 740 F. Supp. 694 (D. Minn. 1990), and *Minnesota Federation of Teachers* v. *Mammenga*, 485 N.W.2d 305 (1992), the courts upheld a program under which high school students could take secular college courses at public expense even if the colleges had sectarian affiliations so long as the college were not pervasively sectarian.

The Attorney General of Maryland concluded that it was permissible to allow parochial schools to schedule trips to a state operated science center, and that the center could transport parochial school students, notwithstanding the arguably conflicting (but readily distinguishable) holding in *Wolman* v. *Walter*, 433 U.S. 229 (1977), that the state may not pay for parochial school class trips. 73 *Maryland O.A.G.* 3 (1988). The Attorney General also opined that if space was limited, it would be permissible for the center to limit access to public school students. The Pennsylvania Attorney General opined that school boards may pay for parochial school trips if the destination is chosen, and the trip controlled by, public school officials. *Pennsylvania O.A.G.* 89-63 (1989).

Public schools may permit parochial school students to attend public school summer programs designed to enable students to pass state mandated competency examinations. *Indiana O.A.G.* 88-10 (1988); 70 *California O.A.G.* 282 (1987); *Missouri O.A.G.* 148 (1979).

Parochial schools may be excluded from public school sports leagues if there are sufficient secular reasons for doing so, such as the impossibility of policing parochial school recruiting practices. They may not be excluded because school officials dislike parochial schools or wish to make them unattractive to students. *Valencia* v. *Blue Hen Conference*, 467 F. Supp. 809 (D. Del. 1979), *aff'd without opinion*, 615 F.2d 1355 (3d Cir. 1980); *Christian Brothers Inst.* v. *No. NJ. Interscholastic League*, 86 NJ. 409, 432 A.2d 26 (1981).

VIII. DISTRIBUTION OF GIDEON BIBLES OR RELIGIOUS LITERATURE

A. Distribution of Religious Literature by Outsiders

The Courts and state attorneys general have all-but-unanimously held that school officials may not give preferential access to non-school personnel to distribute Gideon Bibles on school premises. The leading cases are *Gideons International* v. *Tudor*, 14 NJ. 31, 100 A.2d 857 (1953) and *Berger* v. *Rennselaer School District*, ____ F.2d ____ (7th Cir. 1993). *Accord*, 65 *Maryland O.A.G.* 186 (1980) (collecting opinions of other

state attorneys general); *Arkansas O.A.G.* 89-076 (1989); *Gregoire* v. *Centennial School District*, 907 F.2d 1366 (3rd Cir. 1990); *Lubbock C.L.U.* v. *Lubbock Independent School District*, 669 F.2d 1038, 1040 n.38 (1982); *Goodwin* v. *Cross Country School District*, 394 F. Supp. 417 (E.D. Ark. 1973); *Brown* v. *Board of Public Instruction*, 128 So. 2d 181 (Fla. App. 1960), *aff'd on this point*, 155 So. 2d 371 (1961). *Cf. Louisiana O.A.G.* 920114 (1992) (permitting distribution of Bibles on college campuses). In any event, school officials may not ban the distribution of Gideon Bibles on a public sidewalk in front of a public school. *Bacon* v. *Bradley-Bourbonnais High School District*, 707 F. Supp. 1005 (C.D. Ill. 1989).

The Virginia Attorney General, 1980-81 Report of Virginia Attorney General, 304 (1980), has opined that, if school officials permit a general distribution of literature to students, they may allow the Gideons to distribute Bibles as part of that distribution, provided that in actual practice the religious materials constitute only a small part of the literature distributed, school officials play no role at all in the distribution of the literature, and students are free to browse and take (or leave) whatever literature they wish to without being compelled to ostentatiously reject it.

The Alabama Attorney General, 1978 *Alabama O.A.G.* 18, would go farther, and allow preferential distribution of religious literature so long as it took place in a central place, not a classroom. This opinion is almost certainly incorrect, and is based on a misreading of the admittedly confusing opinion of the Fifth Circuit in *Melzer* v. *Board of Public Instruction*, 577 F.2d 311 (5th Cir. 1978) (*en banc*), holding moot a challenge to a similar rule promulgated by a Florida school district. The Alabama Attorney General apparently misunderstood the opinion to uphold the rule allowing distribution of Gideon Bibles at a central place within the public schools, rather than merely refusing to pass on its constitutionality.

Just as they may not permit outsiders to proselytize students by distributing Bibles, school officials may not permit outside ministers to preach to their students during the school day even if attendance at such sessions is voluntary. *South Carolina O.A.G.* 78-113 (April 15, 1987); *South Carolina O.A.G.* (June 13, 1978). The importance of this rule, which finds further support in *Jager* v. *Douglas County School District*, 862 F.2d 824 (11th Cir. 1989) (ministers barred from offering pre-game prayer at football games), is increasing, as a number of para-church groups, frequently represented by athletes, offer anti-drug messages, frequently with religious overtones at school assemblies, other times using the in-school occasion to invite students to after-school religious programs. Students too may be prevented from delivering religious messages during class, when their peers are a captive audience. *Duran* v. *Nitsche*, 780

F. Supp. 1048 (E.D. Pa. 1991); *De Nooyer* v. *Livonia Public Schools*, 799 F. Supp. 744 (E.D. Pa. 1992).

B. Distribution of Religious Literature by Students

The distribution of literature by students to other students poses difficult legal questions. Some background may help put the issue into perspective.

It is long-since settled that students do not shed their constitutional rights at the schoolhouse gate. *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969). Included among the rights which students enjoy is the right to freedom of speech, a freedom which includes the right not only to speak or write for oneself, but to distribute the writings ("speech") of others. Thus, the courts have generally upheld the rights of students to distribute underground newspapers on the grounds of the public schools, subject to the power of school official to suppress such materials on a showing of compelling interest, such as by demonstrating that the distribution will cause substantial harm to order or the rights of other students. Generally, schools have not been successful in suppressing "underground" papers merely because they disagree with the content of the publication. One interest often advanced by school officials to justify suppression of the distribution of religious literature is the need to avoid violating the Establishment Clause.[3]

Regulations which are not based on the content of a publication, which limit when, where and how ("time, place or manner") all literature may be distributed stand on a very different footing from efforts to suppress speech because of its content. A regulation limiting when, where and how students may distribute literature, flyers, pamphlets and the like is constitutional if it (1) applies without regard to content of the material being distributed; (2) leaves open reasonable alternative channels of communication; (3) further an important governmental interest, without imposing a substantial burden on speech in ways that do not further the interest the regulation is designed to advance.

These principles give rise to a number of questions which have been the subject of much litigation. It is still too early to say with certainty what rule will ultimately emerge. School officials, however, are not without guidance from the existing body of law. In sum, if school officials permit all other forms of non-school sponsored literature to be distributed, but single out religious literature distributed by students for suppression – that is, they adopt a rule absolutely banning only religious literature –

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3. A somewhat easier constitutional standard is imposed on school officials seeking to limit student speech from school-sponsored forums such as school newspapers or school assemblies. Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988); Bethel School District v. Fraser, 478 U.S. 675 (1986).

the only readily available defense would be that permitting the distribution of such literature violated the Establishment Clause. Such an argument would be based either on the argument that distribution of such literature associates the school with the religion or that the distribution impermissibly takes advantage of a captive audience created by state compulsory education laws.

The former argument is unlikely to succeed, because the school can simply require those students distributing the literature to make plain that they enjoy no endorsement from the school. The latter argument is more substantial, but has not yet been accepted by any court.

The equal access case, *Westside Community School Board* v. *Mergens*, would seem to undercut the Establishment Clause defense of school boards, but that case is readily distinguishable because it involved activities taking place before or after the school day, when students had to opt-in to the religious activity. Unless the School Board adopts a regulation barring distribution during instructional hours, distribution cases usually occur during the school day, and those seeking to avoid accepting religious literature, or avoiding religious appeals, must opt-out. Whether any of this will ultimately make a constitutional difference remains to be seen.

Other schools have not sought to single out religious literature for prohibition, but have sought to confine all distribution of non-school publications to fixed locations. Provided that the location offers reasonable access to students (*e.g.*, it is not located at an inaccessible location at an inaccessible time), such regulations will likely be upheld. They serve two important needs unrelated to the suppression of speech: (1) keeping hallways and other school facilities free of clutter; and (2) facilitating the school's ability to police the distribution, and particularly to forestall aggressive efforts to force literature on others. Courts will also likely uphold a reasonable restriction on the total number of persons who may distribute non-school literature on a given day.

A compromise would be to restrict only distribution of religious literature to fixed places. Such a rule would not be a time, place or manner rule because its trigger would be the content of the literature. It would probably face the same burden of justification as an outright ban on the distribution of religious literature, although it might be easier to actually meet that burden.

Finally, although there are few actual holdings, courts have indicated that students may not use the classroom to deliver religious sermons to their classmate. *DeNooyer* v. *Livonia Public Schools*, 799 F. Supp. 744 (E.D. Mich. 1992). However, it is also the case that teachers cannot suppress individual expressions of belief, as by refusing to grade an essay or piece of student art with religious themes. This is obviously a fine line, and one that future litigation is sure to flesh out.

The earlier case divided over whether students could distribute religious literature to their peers during the school day. *Compare Hernandez* v. *Hanson*, 430 F. Supp. 1154 (D. Neb. 1977) (student may distribute such literature) with *Cintren* v. *Board of Education*, 384 F. Supp. 674 (D. P.R. 1974) (ban on distribution of religious literature valid), reaching different conclusions on this question. *Accord*, *Perumal* v. *Saddleback Valley School District*, 198 Cal. App. 3d 64, 243 Cal. Rptr. 545 (Fourth District 1988) (upholding ban on distribution of religious literature and acceptance of religious advertisement for yearbook).

More recently, however, a clear trend has emerged toward permitting such distribution. *Thompson* v. *Waynesboro Area School District*, 673 F. Supp. 1379 (M.D. Pa. 1987), held, by analogy to the "underground newspaper" cases, that school officials could not prohibit students from distributing religious literature. A rule barring all non-school religious and political literature from being distributed on school grounds is unconstitutional. *Clark* v. *Dallas I.S.D.*, 806 F. Supp. 116 (N.D. Tex. 1992); *Slotterback* v. *Interboro School District*, 766 F. Supp. 280 (E.D. Pa. 1991); *Rivera* v. *East Otero School District*, 721 F. Supp. 1189 (D. Col. 1989); *Nelson* v. *Moline School District*, 725 F. Supp. 965 (C.D. Ill. 1989). In *Gregoire* v. *Centennial School District*, 907 F.2d 1366 (3rd Cir. 1991) (Gregoire I), the Third Circuit held that school officials could not bar students from distributing religious literature after school.

However, a time, place, or manner rule confining the distribution of all non-school literature to set locations (*e.g.* the principal's office, entrances and exits) after quick review of the literature by school officials, is constitutional provided it leaves reasonable means of distribution open. Thus, the District Court, *on remand* in *Thompson* v. *Waynesboro Area School District*, *supra*, upheld a school rule confining the distribution of all non-school literature to a table placed in a location designated by school officials. *Accord*, *Nelson* v. *Molina School District*, *supra*. *Cf. Slotterback* v. *Interboro School District*, 766 F. Supp. 280 (E.D. Pa. 1991) (invalidting restrictions as unreasonable.

In *Hedges* v. *Wauconda Community School District #118*, 807 F. Supp. 444 (N.D. Ill. 1992), *app. pending* (7th Cir. 1993), the District Court applied these principles. In that case, the court held that: (a) students could distribute religious literature on school grounds even though it was prepared by others; (b) the school could insist on ensuring that the literature did not imply school approval (as by requiring a disclosure or a clear statement of sponsorship; and (c) the school could impose time, place or manner restrictions on the distribution of such literature. However, the Court warned that in the designation of "approved places for the distribution of literature" the school had to take care not to designate a place which would suggest school approval.

IX. BACCALAUREATE SERVICES AND GRADUATION

School officials may not invite a clergyman to begin or end a graduation ceremony with a prayer, even though the prayer may be non-denominational and even though attendance at graduation is voluntary. *Lee* v. *Weisman*, 505 U.S. _____ (1992). As noted above, one appellate court has held that the school may permit students to offer graduation prayers. *Jones* v. *Clear Creek Ind. School District*, 977 F.2d 963 (5th Cir. 1992). What of school sponsored baccalaureate services?

Baccalaureate services typically feature a sermon on a religious theme and offer prayers for the continued success and well-being of the graduating class. They may or may not have secular elements; if they do, they may be either a small or dominant part of the program. Because attendance is not compulsory, and frequently takes place away from the public school, some authorities have refused to interfere with the practice. *See, e.g., Goodwin* v. *Cross County School*, 394 F. Supp. 417 (E.D. Ark. 1973).

Official sponsorship of baccalaureate services is impossible to reconcile with the school prayer decisions described in Part I, including, especially, *Lee* v. *Weisman*, the graduation prayer case. The Attorney General of Minnesota has so held, *Minnesota O.A.G.* 169-j (1968), as has the Attorney General of Washington, *Washington O.A.G.* 61-62 (No. 119). Of course, the Constitution does not prohibit a purely private baccalaureate service. Two courts have permitted privately sponsored baccalaureate services to take place in rented public school facilities if appropriate disclaimers of public school involvement are posted. *Randall* v. *Pagan*, 765 F. Supp. 793 (W.D.N.Y. 1991); *Verbena Methodist Church* v. *Chelton Bd of Ed.*, 765 F. Supp. 704 (N.D. Ala. 1991). Certainly, no student may be compelled to attend such a service, or be penalized for a failure to do so.

One court has held that graduation cannot take place in a church, although the appellate court vacated that decision as moot, and thus drained it of precedential value. *Lemke* v. *Black*, 763 F. Supp. 87 (E.D. Wis. 1974), *vacated and remanded*, 525 F.2d 694 (7th Cir. 1975). Other authorities have permitted the use of such facilities. *Miller* v. *Cooper*, 56 N.M. 355, 244 P.2d 520 (1952); *State ex rel Conway* v. *District Board*, 162 Wis. 482, 156 N.W. 477 (1916); *Tennessee O.A.G.* 84-034 (1984) (college graduation). *See generally* Part VII.

In something of a twist, a high school valedictorian unsuccessfully sued a school district which ordered her to remove religious references from her valedictory address. *Guidry* v. *Calcasieu Parish School Board*, _____ F. Supp. _____ (M.D. La. 1989), *aff'd on other grounds*, _____ F.2d _____ (5th Cir. 1990).

X. SCIENTIFIC CREATIONISM

School officials may not prohibit the teaching of evolutionary theory. *Epperson* v. *Arkansas*, 393 U.S. 97 (1967). Neither may they require that science teachers give equal time or weight to evolutionary theory and "scientific creationism." *Edwards* v. *Aguillard*, 482 U.S. 578 (1987). Similarly, a total ban on all discussions of human origins would be unconstitutional. *Oregon O.A.G.* OP-6-109 (1988).

Because the Constitution does not forbid teaching about religion, there is no objection to teaching a course on origins, provided that religious theories of human origins are identified as such, not identified as science, and not endorsed by the school. While South Carolina's Attorney General has held that science teachers may discuss creationism in their classes, *South Carolina O.A.G.* _____ (March 24, 1989), the Tennessee Attorney General has ruled that discussion of creationism or other religious theories may not take place in science classes. *Tennessee O.A.G.* 88-149) (1988).

A teacher may be disciplined for lecturing about scientific creationism. *Peloza* v. *Capistrano U.S.D.*, 728 F. Supp. 1412 (C.D. Cal. 1992); *Webster* v. *New Lenox School District*, 917 F.2d 1004 (7th Cir. 1990). Science teachers may state that some religious groups disagree with the theory of evolution.

XI. CURRICULUM CONTENT

A. Bans on Teaching To Meet Religious Objections

Epperson v. *Arkansas*, 393 U.S. 97 (1967), invalidating a state prohibition on teaching evolution, stands more broadly for the proposition that the refusal to teach a subject in the public schools may not be based solely on religious objections. "[T]he First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma," *Epperson*, 393 U.S. at 106. *Accord Grove* v. *Mead School District*, 753 F.2d 1528 (9th Cir.); *Pratt* v. *Independent School District No. 831*, 670 F.2d 771, 776 (8th Cir. 1982); *Williams* v. *Board of Education, County of Kanawha*, 388 F. Supp. 93 (S.D. W.Va. 1975), *aff'd* 530 F.2d 972 (4th Cir. 1975); *Todd* v. *Rochester Community Schools*, 41 Mich. App. 320, 200 N.W. 2d 90 (1972).

Similarly, a California appellate court has held that, while schools could remove a novel which suggested hostility to religion from a list of required or suggested readings, it could not remove it because it decided to protect a religion from criticism. *McCarthy* v. *Fletcher*, 207 Cal. App. 3d 130, 254 Cal. Rptr. 714 (1989). This is obviously a fine line, and will no doubt be difficult to apply.

The lower courts have applied the *Epperson* principle in overruling religious objections to the school's teaching sex education classes. *Smith* v. *Ricci*, 89 N.J. 514, 446 A.2d 501 (1982), *app. dismissed for want of a substantial federal question*, 459 U.S. 962 (1982); *Medeiros* v. *Kiyosaki*, 52 Haw. 436, 478 P.2d 314 (1970); *Citizens for Parental Rights* v. *San Mateo County Board of Education*, 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1975), *app. dismissed*, 425 U.S. 908 (1976); *Hopkins* v. *Hamden Board of Education*, 29 Conn. Supp. 397, 289 A.2d 914 (Ct. Com. Pleas 1971), *app. dismissed*, 165 Conn. 793, 305 A.2d 536 (1973); *Cornwell* v. *State Board of Education*, 314 F. Supp. 340 (D. Md. 1969), *aff'd*, 428 F.2d 471 (4th Cir. 1969).

These same cases also reject the argument that coercion is invariably present when a school offers an elective course in conflict with parental religious belief and that, because excusal exposes students to peer criticism and ridicule, the only effective remedy is a ban on the teaching of such courses. *But see*, *Mercer* v. *Michigan State Board of Education*, 379 F. Supp. 580 (E.D. Mich), *aff'd*, 419 U.S. 1081 (1974) (local option on sex education course constitutional as a means of deferring to parental objections to such teaching).

B. Excusal From Courses
That Contain Objectional Matter

Sometimes, by statute, or perhaps by virtue of the Free Exercise Clause, students claim a right to be excused from those classes to which they object on religious grounds, unless school officials can show a compelling interest in having the student attend, as, for example, if excusal would disrupt the child's or a class' entire education.[4]

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4. The continued validity of a constitutional requirement to excusal from generally applicable school rules and practices discussed in this section and those discussed in Parts IV, IX, XV, and XVI, was cast into doubt by the Supreme Court's decision in the so-called peyote case, Employment Division v. Smith, 494 U.S. 872 (1990). That case held, contrary to settled understandings, that the Free Exercise Clause did not require a state to offer any special justification to apply a "neutral" rule to religious practice, even where application of the rule creates a substantial roadblock to religious observance. Taken literally, that holding would excuse school officials from any constitutional obligation to accommodate religious practice. However, the Court's opinion in Smith noted that the older rule, requiring government to provide compelling reasons for interfering with religious practice, survived in cases presenting "hybrid" claims of right, that is, a claim to Free Exercise and some other constitutional rights. As an example of such a hybrid right, the Court cited cases involving the rights of parents to control the upbringing of their children, a right which will usually exist in the public school context. The discussion in these sections proceeds on the uncertain assumption that the cases discussed in these sections fall within this rubric, and that the compelling interest test applies. In any event, Smith is ordinarily not a bar to voluntary accommodation of religious practice. Finally, state constitutional provisions protecting religious liberty or state statutes may mandate accommodation of religious belief by public school authorities. Pending federal legislation would restore the pre-Smith rule.

Thus, where parents objected to their children's participation in music classes in which audio-visual materials were used, a court held that the state had no compelling interest in having students attend the former, but did have an interest in having students participate in the latter, given the pervasiveness of audiovisual materials in the curriculum. *Davis* v. *Page*, 385 F. Supp. 395 (D. N.H. 1975); *Hardwick* v. *Board of School Trustees*, 54 Cal. App. 696, 205 P. 49 (1921) (excusal constitutionally mandated from required course in social dancing). *Crockett* v. *Sorenson*, 568 F. Supp. 1422 (W.D. Va. 1983) (excusal constitutionally required from Bible-as-Literature course). *Contra*, *Vaughn* v. *Reed*, 313 F. Supp. 431 (W.D. Va. 1970) (Bible-as-Literature); *McCall* v. *Mitchell*, 273 Ala. 604, 143 So. 2d 629 (1962) (no excusal required of student wearing "modest" gym clothes to avoid ridicule by classmates). *Cf. Grove* v. *Mead School District*, 753 F.2d 1528 (9th Cir. 1985) (suggesting excusal may be constitutionally required when student objects to required reading assignment); *Connecticut O.A.G.* 88-021 (1988).

In *Mozert* v. *Hawkins County Board of Education*, 647 F. Supp. 1194 (M.D. Tenn. 1986), a district court held that a school district violated the rights of fundamentalist elementary school students when it failed to excuse them from use of a basal reader series which they believed antithetical to their (or more precisely, their parents') religious beliefs. The court reasoned that if Amish children had to be excused from all secondary schooling, *Wisconsin* v. *Yoder*, 406 U.S. 205 (1971), these children had to be excused from one small part of the school program.

The Court of Appeals reversed. 827 F.2d 1058 (6th Cir. 1987). Each of the three judges on the panel delivered a separate opinion. The first said that compelled exposure to ideas with which one disagreed was not unconstitutional. This judge distinguished *Spence* v. *Bailey*, 465 F.2d 797 (6th Cir. 1975), in which the Sixth Circuit had held that a student with religious objections could not be compelled to participate in ROTC classes, on the ground that it involved more active violation of religious beliefs than did "mere" exposure to religiously conflicting ideas.

Similarly, *Barnette* v. *West Virginia Board of Education*, 319 U.S. 624 (1943), holding that Jehovah's Witnesses could not be compelled to recite the Pledge of Allegiance, was distinguished on the ground that the mandatory recital of the pledge compelled an affirmation of loyalty which the assigned readings did not. This judge apparently would uphold an objection to being forced to read offensive selections aloud or, perhaps, to answering examination questions about objectionable selections.

A second judge agreed with the first judge's reasoning, but added that, on the record before the Court, it was clear that the school could not accommodate the students' request without disrupting the entire teaching process. The third judge argued

persuasively that his colleagues were misconstruing both the law and the factual record. He, however, agreed that the judgment must be reversed because the courts were empowered to intervene in curriculum matters only upon a showing of a violation of the Establishment Clause, not any other claim of constitutional right.

The New York Court of Appeals, in *Ware* v. *Valley Stream H.S.*, 75 N.Y. 2d 114, N.Y. Supp. 2d 167, 550 N.E. 2d 420 (1989), suggested that a New York State Department of Education's regulation requiring students with religious objections to attend classes on AIDS (except individual classes dealing with contraception) might be invalid as applied to members of a small church which preached, and whose members practiced, isolation from the world. (The church was too small to maintain its own parochial schools). The Court of Appeals required the State Department of Education to explain why it had compelling interest in requiring students of that sect to take the course, particularly since its religious teachings offered an adequate substitute. *See* Part XIV, below. However, the Court of Appeals also held that the general rule was that mere exposure to material in conflict with a student's religious views was not unconstitutional and did not require excusal.

The policy and legal arguments for and against requiring excusal are weighty. For a case canvassing these arguments in the context of school prayer (when there was no First Amendment Bar to such prayers), but upholding a student's right to be excused, *see People ex rel Vollmar* v. *Stanley*, 81 Col. 276, 225 P. 610 (127), *overruled on other grounds, Conrad* v. *City and County of Denver*, 656 P.2d 662 (1982).

If excusal is in some cases constitutionally required, there remains the difficult issue of how to resolve those situations in which a parent's desires conflict with the expressed desires of the student. *See Sheck* v. *Baileyville Independent School Committee*, 530 F. Supp. 679 (D. Maine 1982) (noting question); *Cf. Wisconsin* v. *Yoder*, 406 U.S. 205, 241 (1971) (Douglas, J., dissenting) (raising question). No case has yet had to decide that difficult question. It does seem clear that nothing in the federal constitution forbids the granting of excusal if both parent and child seek it, school officials have no pedagogical objections, and other students are not thereby disadvantaged. *Cf. Employment Division* v. *Smith*, 110 S.Ct. 1595 (1990).

Allegations that school officials coerced a student to procure an abortion in violation of the student's religious beliefs state a claim under the Free Exercise Clause. *Arnold* v. *Board of Education*, 800 F.2d 305 (11th Cir. 1989). Merely discussing abortion with a student does not violate the Free Exercise rights of parent or child. *Arnold* v. *Board of Education*, 754 F. Supp. 853 (S.D. Ala. 1990). Similarly, the religious liberty rights of parents are not violated by a program dispensing condoms to

children with parental consent. *Matter of Alfonso* v. *Fernandez*, 151 Misc.2d 899, 584 N.Y. Supp.2d 406 (1992).

Teachers may not refuse to aid in the recitation of the Pledge of Allegiance, even if they have religious objections to its recitation. *Palmer* v. *Board of Education*, 603 F.2d 1271 (7th Cir. 1979). Students, however, may not be compelled, over their objections, to recite or stand during the Pledge of Allegiance or the National Anthem, *Barnette* v. *West Virginia Board of Education*, 319 U.S. 624 (1943); *Sherman* v. *Community Consolidated School District*, ____ F.2d ____ (7th Cir. 1992); *Lipp* v. *Morris*, 579 F.2d 834 (3rd Cir. 1978); *Sheldon* v. *Fannin*, 221 F. Supp. 766 (D. Arizona 1963); *Arizona O.A.G.* 82-012 (1982). But the recitation of the Pledge of Allegiance is not unconstitutional because it includes the phrase "one nation under God." *Sherman* v. *Community School District*, *supra*. However, school personnel may not pressure a child to recite the Pledge. *Id.*

XII. SECULAR HUMANISM

A. General

Accusations that the public schools are violating the prohibition on establishing religion by teaching the 'religion' of Secular Humanism are common. In *Torcaso* v. *Watkins*, 367 U.S. 488 (1961), the Supreme Court noted in *dictum* that Secular Humanism was a religion for constitutional purposes. It did not define what it meant by "Secular Humanism." That observation has been the source of much misunderstanding.

If defined as affirmative hostility to a belief in a Deity and the assertion that belief in a Deity carries with it religious obligations, ethical commitments and the possibility of divine intervention in human affairs, Secular Humanism is a religion in the constitutional sense. The public schools may no more preach that God has no role to play in human affairs than they may advance the doctrine that only through belief in God can man attain salvation. *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 225 (1963).

It does not follow, however, that teaching without advocating religion amounts to Secular Humanism in the constitutional sense, for if it did the prohibition on established religion would be at war with itself. *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 225 (1963); *Grove* v. *Mead School District*, 753 F.2d 1528 (9th Cir. 1985) (Canby, J., concurring). Generally, it is in this latter sense that critics of the public schools complain about the teaching of Secular Humanism.

In *Smith* v. *Board of Commissioners*, 655 F. Supp. 939 (S.D. Ala. 1987), a district court upheld contentions that history and home economics textbooks established the religion of Secular Humanism by systematically failing to include religious points of view. In a sharply worded opinion, the Eleventh Circuit reversed. 827 F.2d 684 (11th Cir. 1987). It found that "none of [the challenged] books convey a message of governmental approval of secular humanism or governmental disapproval of theism." The fact that the neutral textbooks were offensive to the plaintiffs' religious beliefs was held insufficient to render the textbooks unconstitutional, as was the bare fact that they failed to discuss religion. *Accord Brown* v. *Woodland Joint Unified School District*, Civ. No. 5-91-0032 (C.D. Col. 1992), *app. pending* 9th Cir. 1992); *Fleischfresser* v. *Directors, School District 200*, 805 F. Supp. 584 (N.D. Ill. 1992) (Impression reading series does not establish religion notwitstanding references to ghosts, goblins and witches).

B. Values Education

The teaching of values is particularly likely to raise charges that schools are promoting Secular Humanism. Public schools may teach values. *Board of Education* v. *Pico*, 457 U.S. 853 (1982). Depending upon how values are taught, a school could be performing a valuable public service, wasting its students' time, teaching 'Secular Humanism' or sectarian dogma. To judge from the absence of successful challenges, there is little indication that either religious dogma or Secular Humanism are regularly being taught in the public schools. The Constitution requires only that the state be neutral in matters of religion, neither favoring nor disfavoring religious values. For a good general discussion of the constitutional law of values education, *see*, 64 *Maryland O.A.G.* 134 (1979). *Cf. Sherman* v. *Consolidated School District 21*, 1992 W.L. 339831 (7th Cir. 1992).

New York State requires every school district to have an advisory committee on AIDS instruction which must have at least one clergy representative. AIDS instruction must transmit accurate information about the disease, but must also reflect community values. A challenge to the requirement that the advisory boards contain a clergy member was rejected in *N.Y. State School Boards Association* v. *Sobol*, 79 N.Y.2d 333, 582 N.Y.S.2d 960, 591 N.E.2d 1146 (1992).

XIII. COMPULSORY ATTENDANCE AND RELIGIOUS HOLIDAYS

The Supreme Court has repeatedly rebuffed constitutional challenges to compulsory attendance laws by "home-schoolers," including Free Exercise claims that such statutes interfere with parents' personal religious obligation to educate their children. *Waddell* v. *Michigan*, 483 U.S. 1002 (1987); *Snider* v. *Virginia*, 476 U.S. 1179

(1986). *See Duro* v. *District Attorney*, 712 F.2d 96 (4th Cir. 1983). A full discussion of the law of home schooling is beyond the scope of this paper.

Two problems arise from schedule conflicts between the school calendar and religious holidays. The first of these is excusal from compliance with compulsory attendance laws, and is usually covered by statutory exemption. Where no statutory exemption exists, the Free Exercise Clause requires excusal,[5] at least for a reasonable number of days. *Church of God* v. *Amarillo Independent School District*, 511 F. Supp. 613 (N.D. Tex. 1981), *aff'd* 670 F.2d 46 (5th Cir. 1982). However, a policy of excusal must be available equally to members of all faiths. *Oklahoma O.A.G.* 87-11.

The second problem is whether schools may or must close on religious holidays so as to avoid a conflict with students' religious practices. While public schools need not close on religious holidays, they may do so as a matter of administrative convenience, as, for example, the absence of large numbers of teachers or students. *Zorach* v. *Clauson*, 343 U.S. 306, 313-14 (1952).

When a school chooses not to close on days observed by some students as religious holidays, conflicts between scheduled events (exams, field trips, graduation and extra-curricular activities) and religious holidays will exist. One state has held that school officials may, without unconstitutionally establishing religion, prohibit the scheduling of extra-curricular activities on Friday night, Saturday, and Sunday morning to avoid conflicts with students' religious observances. *Student Playcrafters* v. *Board of Education*, 177 N.J. Super. 66, 424 A.2d 1192 (1981), *aff'd*, 88 N.J. 74, 438 A.2d 543 (1982).

Church of God v. *Amarillo Independent School District*, *supra*, holds that penalties (such as the refusal to provide a make-up examination or the lowering of grades) cannot be imposed on students absent for religious holidays. Many districts provide by rule that class trips, graduation and other school events will not be scheduled on religious holidays. It is, however, unlikely that court would enjoin a class trip scheduled for a religious holiday in order that an observant student not miss it. Moreover, a school need not reschedule graduation in order to avoid a conflict with the Sabbath observed by some of the graduates. *Smith* v. *North Babylon School District*, 844 F.2d 90 (2d Cir. 1988). *Contra Tennessee O.A.G.* 84-034 (1984).

XIV. DRESS CODES

Students may not be compelled to wear gym clothes which, for religious reasons, they consider immodest. *Moody* v. *Cronin*, 484 F. Supp. 270 (C.D. Ill. 1979); *Mitchell*

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5. At least it did until the Smith decision discussed earlier. See Part XI, at footnote 4.

v. *McCall*, 273 Ala. 604, 143 So. 629 (1962). The two decisions disagreed, however, whether such students must be offered excusal from mixed gymnasium classes in order to avoid exposure to those wearing what they consider to be immodest clothing. *Moody* held that they must, but *McCall* held that, while students themselves must be allowed to dress modestly, they would not be allowed to absent themselves from the class to avoid viewing others dressed immodestly or to avoid ridicule for their chaste dress. *See also*, *South Carolina O.A.G.* (Nov. 13, 1797). Students with religious objections to mixed gym classes, but only such students, may be offered sex-segregated gym classes without violating Title IX, 43 Fed. Reg. 18,380 (May 1, 1978).

XV. VACCINATION REQUIREMENTS

Schools may insist that all students be vaccinated, notwithstanding religious objections. *Prince* v. *Commonwealth*, 321 U.S. 158 (1944); *Mosier* v. *Barren County Board of Health*, 308 Ky. 829, 215 S.W.2d 967 (1948); *Cude* v. *State*, 237 Ark. 927, 377 S.W.2d 816 (1964); *South Carolina O.A.G.* (December 1, 1965). However, some states, by statute, carve out an exception for those with religious objections to immunization.

Where the exception is limited to those who belong to a recognized religious faith, all courts which have considered challenges to that limitation have invalidated it. The courts have disagreed about how to remedy such an unconstitutional statute. Some have simply required all children to be vaccinated. *Davis* v. *Maryland*, 294 Md. 370, 451 A.2d 107 (1982) (overruled by subsequent statute); *Brown* v. *Stone*, 378 So. 2d 219 (Miss. 1980). Other courts have extended the exemption to all with sincere religious beliefs against immunization, whether or not members of an organized church with objections to immunization. *Lewis* v. *Sobol*, 710 F. Supp. 506 (S.D. N.Y. 1989); *Sherr* v. *Northport-East Northport Union Free School District*, 672 F. Supp. 81 (E.D.N.Y. 1987); *Avard* v. *Dupuir*, 376 F. Supp. 479 (D. N.H. 1974); *Maier* v. *Besser*, 73 Misc. 2d 241, 341 N.Y.S. 411 (1972). *Accord Montana O.A.G.* 44-7 (1991). A school may apparently condition participation in athletic events on proof of immunization. *Calandra* v. *State College Area School District*, 99 Pa. Cmnwlth. Ct. 223, 512 A.2d 809 (1986).

XVI. TEACHERS' RIGHTS AND RESPONSIBILITIES

A. Religious Garb

Some states prohibit public school teachers from wearing religious garb while teaching. These provisions have generally been upheld on the theory that they help maintain the state's neutrality vis-a-vis religion. *Zellers* v. *Huff*, 55 N.M. 501, 236 P.2d

949 (1951); *Finot* v. *Pasadena City Board of Education*, 58 Cal. Rptr. 520, 250 Cal. App. 2d 226 (1967). Other courts disagree about the necessity of such restrictions, and have held that they impinge on the religious freedom of teachers. *Gerhardt* v. *Heid*, 66 N.D. 444, 266 N.W.2d 718 (1936).

The constitutionality of a statute prohibiting teachers from wearing religious garb has been upheld in the face of objections that it denied a teacher her Free Exercise rights. *Cooper* v. *Eugene School District*, 301 Or. 358, 723 P.2d 298 (1986), *app. dismissed*, 480 U.S. 942 (1987); *Accord, U.S.* v. *Board of Education*, 911 F.2d 882 (3rd Cir. 1990). Both courts also rejected claims that such state statute violated federal civil rights statutes requiring accommodation of religious practices. The Oregon court construed the statute not to bar religious jewelry (a cross or star-of-David) or the occasional wearing of religious symbols (*e.g.*, ashes on Ash Wednesday). But not all religious garb is within the scope of the prohibition. If the garb cannot be identified as religious by students, the requirement that employers accommodate religious practice would be applicable. *E.E.O.C.* v. *Reads, Inc.*, 759 F. Supp. 1150 (E.D. Pa. 1991); *Cf. McGlothin* v. *MESC*, 556 So.2d 324 (1990) (teachers may not be denied unemployment benefits if fired for wearing religious garb).

B. Religious Holidays

Title VII of the 1964 Civil Rights Act provides that employers (a term which includes school boards) must reasonably accommodate the religious observances of employees. They need not accommodate such observances if accommodation would cause undue hardship, or impose more than *de minimis* costs. Thus, teachers need not be paid for time not worked due to religious observance. *T.W.A.* v. *Hardison*, 432 U.S. 63 (1977). In considering whether undue hardship exists, courts may consider the actual impact on other employees, such as their rights under a contractual seniority provision. *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 702 (1985).

Ansonia Board of Education v. *Philbrook*, 479 U.S. 60 (1986), substantially narrowed the scope of mandated accommodation of employee religious observance. An employer may now offer an employee any reasonable accommodation, even though other available means of accommodation may be less onerous to the employee. Leave without pay was specifically approved as an acceptable means of accommodation. However, if an employer allows employees "personal days" which they may use as they see fit, the employer may not ban their use for religiously motivated absences.

One state has held that it would unconstitutionally establish religion for a school board to allow teachers extra days off with pay in order to observe their religious holidays. *Hunterdon Central High School Board of Education* v. *Hunterdon Central High School Teachers Association*, 174 N.J. Super. 468, 416 A.2d 980 (App. Div. 1980), *aff'd*,

86 N.J. 43, 429 A.2d 354 (1981). Two states have held that it is not unconstitutional for a collective bargaining agreement to treat Good Friday as a holiday with pay. *CSEA* v. *Sequoia Union High School District*, 67 Cal. App. 157, 136 Cal. Rptr. 594 (1977); *Americans United* v. *County of Kent*, 293 N.W. 2d 723 (Mich. App. 1980).

Efforts have been made by Jewish teachers to secure time off with pay for Rosh Hashana or Yom Kippur on the theory that Christian teachers do not have to take time off without pay to observe Christmas or Good Friday, since these are included in the spring or winter recesses. Such an effort was rebuffed in *Pinsker* v. *Joint District 28J*, 735 F.2d 388 (10th Cir. 1984).

Title VII requires schools to attempt to accommodate teachers with religious objections to teaching a particular course. *South Dakota O.A.G.* 89-19.

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RELIGION AND THE PUBLIC SCHOOLS:
A SUMMARY OF THE LAW

December, 1994 Update

Marc D. Stern
American Jewish Congress

Part I.A.

p.2, ¶ 4 After *Doe* v. *Aldine I.S.D.*, 563 F.Supp 883 (S.D. Texas 1982), **add:**

Coaches may not lead athletic teams in prayer. *Doe* v. *Duncanville I.S.D.*, 994 F.2d 160 (5th Cir. 1993); Accord *Tenn. O.A.G.* 93-38.

The **citation** for *Doe* v. *Human* is: 725 F.Supp. 1499 (W.D. Ark.), aff'd without opinion, 923 F.2d 857 (8th Cir. 1990).

p.3, ¶ 1 After the citation of *Jones* v. *Clear Creek I.S.D.*, 977 F.2d 963 (5th Cir. 1992), **add:**

However, *Jones* does not permit student sponsored prayers during the school day or at events other than graduation. *Ingebretsen* v. *Jackson Public School District*, 864 F.Supp. 1473 (S.D. Miss. 1994) app. pending (5th Cir.1994). *Jones* v. *Clear Creek* has been followed by some courts in other circuits, *Adler* v. *Duval County School Dist.*, 851 F.Supp. _____ (M.D. Fla. 1994) app. pending (11th Cir. 1995); it has been rejected by a number of authorities. Explicitly disagreeing with Jones was *Harris* v. *Joint School District*, _____ F.3d _____ (9th Cir. 1994); *Gearon* v. *Loudon County School Board*, 849 F.Supp. 1097 (E.D. Va. 1993) and *ACLU* v. *Blackhorse Pike School Dist.*, ___ F.2d ___ (3rd Cir. 1993) (staying order based on *Jones*). Accord, *Kansas O.A.G.* 93-67 (1993); *Tenn. O.A.G.* 93-42; *Md. O.A.G.*, 1993 W.L. 523, 415. The Kentucky Attorney General regards the issue as unsettled, *Ky. O.A.G.* 94-55. See Part IX, *infra*.

p. 3, ¶ 2 After the citation of *Md. O.A.G.*, 69 *A.G. Md.* ____ (1984), **add:**

_____ *A.G. Md.* _____, 1993 W.L. 523, 415 (1993) (same).

Part I.B.

p.4, top of page The **citation** for *Peloza* v. *Capistrano U.S.D.* is: 782 F.Supp. 1412 (C.D. Cal. 1992), aff'd in relevant part, 37 F.3d 517 (9th Cir. 1994). The Court of Appeals remanded the case for a determination of whether the District Court's remedial order improperly limited Peloza's right to speak on religious subjects out of school.

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Part II.

p.6, ¶ 2 After *Joki* v. *Board of Education*, **add**:

, or a picture of Jesus on a school wall. *Washegesic* v. *Bloomingdale Public Schools*, 813 F.Supp. 559 (W.D. Mi. 1993), aff'd, 33 F.3d 679 (6th Cir. 1994).

p.6, ¶ 3 **Add**:

A school may use a blue devil as a school emblem without establishing religion. *Kan. O.A.G.* 94-78 (1994).

p.6, ¶ 3 After *Malnak* v. *Yogi*, **add**:

A claim that the Whittle Communications' Channel One established religion by "promot[ing] the value of individual business interests in the classroom and thereby promot[ing] the idea that a student's worth and character are . . . derived from owning . . . certain commercial products" was rejected in *Wallace* v. *Knox County Bd. of Educ.*, 1 F.3d 1243, 1993 W.L. 304460 (6th Cir. 1993) (table).

Part III.A.

p.6, ¶ 5 The **citation** for *Widmar* v. *Vincent* is: 454 U.S. 263 (1981).

p.7,¶ 1 The **citation** for *Sease* v. *School District* is: 811 F.Supp. 183 (E.D. Pa. 1993), app. pending (3rd Cir. 1994). The Third Circuit held that a school district could not evade the Equal Access Act by prohibiting students from initiating non-curriculum related clubs. *Pope* v. *East Brunswick Bd. of Educ.*, 12 F.3d 1244 (3rd Cir. 1993).

Part III.B.

p.9, ¶ 3 The paragraph beginning "What happens if state law . . ." should be **deleted**, and the following **substituted**:

Although the Equal Access Act states that it does not permit otherwise illegal activities to take place, a state may not circumvent the Act by declaring student religious clubs illegal under state law. *Garnett* v. *Renton Area School Dist.*, 987 F.2d 641 (9th Cir. 1993).

p. 9, ¶ 4 **Add** after *Kansas O.A.G.* 82-51 (1982):

The U.S. Court of Appeals for the Fourth Circuit has held that a school district may not charge a church more than other not-for-profit groups, even if the church is renting the public school to avoid building a permanent structure for itself. *Fairfax Covenant Church* v. *Fairfax County School Bd.*, 17 F.3d 703 (4th Cir. 1994).

Part III.D.1.

p.10, ¶ 2 At the end of the paragraph beginning "If broadly available . . ." **add:**

School facilities may be made available to the Boy Scouts even though they insist that members hold a belief in God. *Sherman* v. *Consolidated School Dist.*, 980 F. 3d 437 (7th Cir. 1993).

Part III.D.2.

p.11, ¶¶ 1, 2 **Replace** the paragraphs beginning "The Second Circuit . . ." and "The Third Circuit . . ." with:

In *Lamb's Chapel* v. *Center Moriches School District*, 113 S.Ct. 2141 (1993) the Supreme Court held that a school district which rented its building to all types of community groups, and allowed them to discuss, *inter alia*, issues concerning the family, could not refuse to rent the building to a religious group to discuss those issues from a religious point of view. The Court rejected the District's Establishment Clause defense, pointing out in particular that the program would take place on the weekends, and was intended for the general public and not just students.

The decision itself rests on the relatively narrow ground that the action of the District in excluding the church's program constituted viewpoint discrimination. As a technical matter, then, *Lamb's Chapel* does not conclusively rule out a rule barring all religious groups, which, to use the language of *Lamb's Chapel*, would be a content-based exclusion, not a viewpoint based one. In light of broad language elsewhere in the opinion, it seems doubtful that the Court would uphold such a restriction. Unfortunately, the Court's approach to public forum issues is so confusing that it is difficult to say with certainty what the outcome would be if the issue of subject matter discrimination were squarely presented. This issue is now raised in *Full Gospel Temple* v. *Community School Bd. 27*, (SDNY 1994).

In *Fairfax Covenant Church* v. *Fairfax County School Board*, 17 F.3d 703 (4th Cir. 1994), the Fourth Circuit held that a school board may not charge a church using school facilities market rate rents when other long-term not-for-profit users are charged only maintenance costs. The Court rejected the argument that the higher fees were necessary to avoid subsidizing the church.

p.11, ¶ 3 **Add**, at the end of the paragraph beginning "It has been held . . .":
A school may not restrict general access to its building during the immediate post-school hours, if one or two favored groups are permitted access. *Good News/Good Sports Club* v. *School District of Ladue*, 37 F.3d 1801 (8th Cir. 1994), petition for certiorari pending, 63 U.S.L.W. _____ (1994).

Part IV.

p.12, ¶ 2 The **citation** for the first case cited after Accord is: *Johnson* v. *Shineman*, 658 S.W.2d 910 (Mo. Ct. of Apps. 1983).

p.13, ¶ 1 **Insert** before the paragraph beginning "The constitutional . . .":
In *Clever* v. *Cherry Hill Twshp. Bd. of Educ.*, 838 F.Supp. 929, (D. N.J. 1993), the court upheld a rule which required school officials to note a wide variety of religious holidays on monthly school calendars. The court also upheld a rule permitting a 10-day central holiday display including religious symbols (such as menorahs and creches), provided that they were surrounded by appropriate secular symbols.

For a case holding that a gospel choir under school sponsorship may not sing only religious songs see *Sease* v. *School District*, 811 F.Supp. 183 (E.D. Pa. 1993), app. pending.

The display of Halloween symbols (witches and the like) does not establish religion. *Guyer* v. *School Bd. of Alachua*, 634 So.2d 806 (Fla. Dist. Ct. App. 1994), petition for certiorari pending, 63 U.S.L.W. _____ (1994).

Part V.

p.14, top of page The **citation** for *Quappe* v. *Endry* is: 772 F.Supp. 1004 (S.D. Ohio), aff'd, 979 F.2d 851 (6th Cir. 1992).

Part VI.

p.14, ¶ 2 The *Grumet* case, cited in the second paragraph, was affirmed by the New York Court of Appeals, 81 N.Y.2d 518, 601 N.Y.S.2d 61, 618 N.E.2d 94 (1993). The Supreme Court in turn affirmed that decision. 114 S.Ct. 2481 (1994). New legislation designed to overcome the deficiencies identified by the Supreme Court was quickly enacted. That, too, is now being challenged in the New York State courts.

Part VII.

p.17, ¶ 1 **Insert** before the paragraph beginning "The Attorney General of Maryland . . .":

> A state run correspondence course program may not contract with religious schools to provide secular courses on a correspondence basis, but it may allow individual private school students to take an occasional course. *Alaska O.A.G.* 663-93-1079 (1993).

p. 17, § 3 State interscholastic sports leagues may enforce anti-recruiting rules which require athletes to live in the public school district where their parochial school is located, even if the parochial school has a wider catchment area. *Mississippi H. S. Activities Ass'n* v. *Coleman*, 631 So. 2d 768 (1994). However, this case was decided without reference to the Religious Freedom Restoration Act, 42 U.S.C. 2000bb et seq.

Part VIII.A.

p.17, ¶ 4 The **citation** for *Berger* v. *Rennselaer School District* is: 982 F.2d 1160 (7th Cir. 1993).

p.18, top of page After *Bacon* v. *Bradley-Bourbonnais High School District*, 707 F.Supp. 1005 (D.D. Ill. 1989), **add**:
Accord *Schanou* v. *Lancaster County School Dist.*, 863 F.Supp. 1048 (D. Neb. 1994) (distribution of Gideon Bible on school sidewalks in rural community where all groups have access to sidewalks permissible). See also *Ark. O.A.G.* 93-440 (1994). The Boy Scouts may distribute membership fliers to students, if other groups are permitted to do so, notwithstanding the requirement that Scouts believe in God. *Sherman* v. *Community School District*, 980 F.2d 437 (7th Cir. 1993).

p. 18, ¶ 3 *Duran* v. *Nitsche*, 780 F.Supp. 1048 (E.D. Pa. 1991), was vacated as moot, 982 F.2d 1331 (3rd Cir. 1992).

p.19, top of page *DeNooyer* v. *Livonia Public Schools*, 799 F.Supp. 744 (E.D. Pa. 1992), was affirmed without published opinion, 1993 W.L. 300326 (6th Cir. 1993). A rule leaving the permissibility of distribution of all religious and secular literature to the unfettered discretion of school officials cannot stand. *Johnston-Loehner* v. *O'Brien*, 859 F.Supp. 575 (M.D. Fla. 1994).

Part VIII.B.

p.20, ¶ 5 *DeNooyer* v. *Livonia Public Schools*, 799 F.Supp. 744 (E.D. Pa. 1992), was affirmed without published opinion, 1993 W.L. 300326 (6th Cir. 1993).

p.21, ¶ 4 In *Hedges* v. *Wauconda Community School District #118*, 807 F.Supp. 444 (N.D. Ill. 1992), aff'd in part, rev'd in part, 9 F.3d 1295 (7th Cir. 1993) the Seventh Circuit held that (1) students could distribute religious literature to their peers; (2) the school could bar distribution of multiple copies of materials not prepared by students on the ground that it had a valid educational interest in encouraging students to learn how to express themselves; and (3) the school may insist that all distribution take place from a fixed location. See, generally, *Md. O.A.G.* ____, 1993 W.L. 523, 415 (1993).

Part IX.

p.22, ¶ 1 The Third and Ninth Circuits, however, have held that *Lee* bars even student initiated graduation prayer. *Harris* v. *Joint School District*, _____ F.2d _____ (9th Cir. 1994); *ACLU* v. *Blackhorse Pike School District*, No. 23-5368 (3rd Cir. 1993), after remand, ___ F.Supp. ____ (D.N.J. 1994). Accord *Gearon* v. *Loudon County School Bd.*, 849 F.Supp. 1097 (E.D.Va. 1993). The issue is pending in several other courts, e.g., *Adler* v. *Duval County School Dist.*, 851 F.Supp. 446 (M.D. Fla. 1994), app. pending (11th Cir. 1994) (following *Clear Creek*). The Kansas Attorney General has opined that *Lee* bars student-led prayers at graduation. *Kansas O.A.G.* 93-67 (1993). The Tennessee and Maryland Attorney Generals have reached this conclusion as well. *Tenn. O.A.G.* 93-42; *Md. O.A.G.* ____, 1993 W. 523, 415. The Kentucky Attorney General regards the issue as open. *Ky. O.A.G.* 94-55

p.22, ¶ 3 **Add** before *Randall* v. *Pagan*:

Shumway v. *Albany County School Dist.*, 826 F.Supp. 1320 (D. Wy. 1993);

Part X.

p.23, ¶ 3 The **citation** for *Peloza* v. *Capistrano U.S.D.* is: 782 F.Supp. 1412 (C.D. Cal. 1992), aff'd, 37 F.3d 517 (9th Cir. 1994), not 728 F.Supp. as printed.

Part XI.A.

p.24, ¶ 1 Accord, *Ark. O.A.G.* 93-414 (1994). For a detailed review of one sex-education curriculum in the light of a statute prohibiting the teaching of religious values in sexual-education courses, see *Coleman* v. *Caddo Parish School Bd.*, 1994 W.L. 116, 208 (La. Ct. of Apps. 1994).

p. 24, ¶ 2 Books may not be removed from libraries on the basis of the religious beliefs of school board members, *Del Carpio* v. *St. Tammany Parish*, 1994 W.L. 567861 (E.D. La. 1994)

p.24, ¶ 3 The concern expressed in footnote 4 is entirely ameliorated by the Religious Freedom Restoration Act, 42 U.S.C. §2000bb et seq. The Act restores the prior compelling state interest standard, and places the burden of proving the existence of a compelling interest on the government body asserting such an interest. For a good discussion of the Religious Freedom Restoration Act in the public school context, see *Cheema* v. *Thompson*, No. 94-16097 (9th Cir. 1994) (unpublished) (issuing temporary restraining order allowing Sikh students to carry small ceremonial dagger welded to sheath).

p. 26, ¶ 4 Accord, *Ark. O.A.G.* 93-414 (1994) (neither Constitution nor Religious Freedom Restoration Act require excusal from AIDS course).

p.27, ¶ 1 **Substitute** the following:

> The courts disagree over whether teachers may refuse to participate in the Pledge of Allegiance, just as students have the right to refuse to participate. Some courts hold that teachers have that right. *Russo* v. *Central School Dist.*, 469 F.2d 623 (2d Cir. 1972); *Opinion of the Justices*, 1977 Mass. Adv. Sk. 1048 (1977); *State* v. *Lundquist*, 262 Md. 534, 278 A.2d 263 (1971); *Ma. O.A.G.* 1976/77, #34. Other courts hold that teachers may be compelled to participate. *Palmer* v. *Bd. of Educ.*, 603 F.2d 1271 (7th Cir. 1979).

The **citation** for *Sherman* v. *Consolidated School District 21* is: 980 F.2d 437.

A claim that values must be taught from the Bible was rejected in *Skipworth* v. *Bd. of Educ.*, 874 P.2d 487 (Col. Ct. Apps. 1994)

p. 28, ¶ 1 *Fleishfresser* v. *Director, School Dist.* was affirmed by the Seventh Circuit, 15 F.3d 680 (7th Cir. 1994) and *Brown* by the Ninth Circuit in 27 F.3d 1373 (9th Cir. 1994).

Part XII.B.

p.28, ¶ 2 The **citation** for *Sherman* v. *Consolidated School District 21* is: 980 F.2d 437.

Part XIII.

p.29, ¶ 1 note 5: This note is no longer valid in light of the passage of the Religious Freedom Restoration Act, discussed above in Part XI.A.

Part XIV.

p.29, ¶ 5 A public school may not compel Native American males to wear their hair short in violation of their religious beliefs. *Alabama and Coushoth Tribes*, 817 F.Supp. 1319 (E.D. Tex. 1993). Cf. *Hatch* v.

Goerke, 502 F.2d 1189 (10th Cir. 1974). See, generally, ____ *Md. O.A.G.* ____, 1993 W.L. 523,415 (1993) (wearing of religious symbols by students generally protected; but that right may yield where compelling need exists).

p.31, ¶ 1 After *Gerhardt* v. *Heid*, 66 N.D. 444, 266 N.W.2d 718 (1936). **add**:

The Louisiana Attorney General has held that college teachers may wear religious garb. 1982-83 *La. O.A.G.* 17 (1982).

Part XVI.A.

p.31, ¶ 1 The California Attorney General has opined that teachers may be barred from wearing political buttons in the classroom. *Cal. O.A.G.* 93-1201, 1994 W.L. 83719. That ruling has obvious implications for the regulation of religious buttons and t-shirts worn by teachers. A public school may not refuse to employ teachers who send their children to parochial or other private schools. *Arkansas O.A.G.*, 1993 W.L. 425272 (1993) (collecting cases).

Part XVI.B.

p.32, top of page **Add**, after *Americans United* v. *County of Kent*, 293 N.W.2d 723 (Mich. App. 1980):

Similarly, it has been held that the Establishment Clause is no bar to observing a national day of thanksgiving for victory in the Gulf War, *CSEA* v. *Marion Community College Dist.*, 19 Cal. Rptr. 572, 13 Cal. App. 273 (1st Dist. 1993).

p. 33, ¶ 2 **Substitute** the following for the first sentence:

The courts disagree over whether teachers may refuse to participate in the Pledge of Allegiance; just as students have the right to refuse to participate. Some courts hold that teachers have that right. *Russo* v. *Central School Dist.*, 469 F.2d 623 (2d Cir. 1972); Opinion of the Justice, 1977 Mass. Adv. Sk. 1048 (1977); *State* v. *Lundquist*, 262 Md. 534, 278 A.2d 263 (1971); *Ma. O.A.G.* 1976/77, #34. Other courts hold that teachers may be compelled to participate. *Palmer* v. *Bd. of Educ.*, 603 F.2d 1271 (7th Cir. 1979).